U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

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In re: DAVON SAMUEL DAVIDS a.k.a. Davon Davids a.k.a. Davon S. Davids

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alton G. Rose, Esquire
90-50 Parsons Boulevard, Suite 201
Jamaica, New York 11432

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] - Convicted of firearms or destructive device violation

APPLICATION: Cancellation of removal

In a decision dated May 15, 1998, an Immigration Judge found the respondent removable on the charge set forth above, pretermitted his application for cancellation of removal, and ordered him removed to Jamaica. The respondent has appealed. The appeal will be sustained, and the record remanded to the Immigration Judge.

The respondent, a lawful permanent resident, was convicted on December 19, 1996, in the Brockton District Court, Brockton, Massachusetts, for the offense of unlawfully owning, possessing or transferring possession of a firearm, in violation of Massachusetts General Laws, Chapter 269, Section 10H.

On appeal, the respondent argues that the Immigration Judge erred in pretermitting his application for cancellation of removal, because he incorrectly found that the respondent had failed to satisfy the residency requirements set forth at section 240(A)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b. The respondent contends that the operative date in terminating the period of physical presence under section 240(A)(d)(1) of the Act is the date of the conviction, rather than the date the offense occurred.

In his decision, the Immigration Judge found that the period of physical presence terminates upon commission of the offense, rather than the date the conviction occurred. The Immigration Judge therefore held that, because the respondent's offense was committed before he had accrued the requisite 7 years' continuous residence, he was ineligible to apply for cancellation of removal

pursuant to section 240A (a)(1) of the Act (eligibility requirements for lawful permanent residents seeking cancellation of removal). However, in reaching that conclusion, the Immigration Judge necessarily first held that the ground of removability under which the respondent was charged, section 237(a)(2)(C) of the Act, was included within the parameters of section 240A(d)(1) of the Act (I.J. at 3-4; Tr. at 27-34). Upon review of the record, we do not agree that the ground of removability under which the respondent was charged is included within section 240A(d)(1) of the Act, and therefore we find that the respondent is eligible to apply for cancellation of removal.

The dispositive issue in this case is whether the commission of an offense constituting the ground of removability listed in section 237(a)(2)(C) of the Act serves to terminate continuous physical presence under section 240(A)(d)(1)of the Act. [1]

Section 240A(d)(1) of the Act reads, in its entirety:

> Termination of Continuous Period. For purposes of the section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible in the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest (emphasis added).

While the ground of removability under which the respondent is charged, section 237(a)(2)(C) of the Act, is clearly contained within section 240A(d)(1) of the Act, section 240A(d)(1) also requires that the offense rendering the respondent inadmissible or removable also be "referred to in section 212(a)(2)." Section 237(a)(2)(C) is not one of the grounds of removability referred to in section 212(a)(2) of the Act. See § 212(a)(2) of the Act.

The plain language of section 240A(d)(1) reveals that Congress intended to specifically reference the offenses listed in section 212(a)(2) of the Act. See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) ("there is a strong presumption that Congress expresses its intent through the language it chooses"); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (courts "must give effect to the unambiguously expressed intent of Congress"). Based on a plain reading of the section, we believe that Congress intended that aliens whose removability grounds are not referred to in section 212(a)(2) are not included within those grounds considered in section 240A(d)(1) of the Act as cutting off continuous residence. See Matter of Perez, supra, at 6 (only those grounds of removal referred to in section 212(a)(2) are "qualifying grounds" for purposes of section 240A of the Act). Had

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[1] We agree with the Immigration Judge that the period of continuous residence or physical presence for cancellation of removal purposes is deemed to end on the date that a qualifying offense has been committed. Matter of Perez, Interim Decision 3389 (BIA 1999).

Congress intended otherwise, it would have either not included the requirement that the offense be referred to in section 212(a)(2), or it would have written the provision in such a way as to clearly delineate between grounds of inadmissibility and grounds of removability.

However, it is important to note that several of the grounds of removability found in section 237(a)(2) of the Act are referred to in section 212(a)(2) of the Act, while some, such as section 237(a)(2)(C), are not. Compare § 212(a)(2) of the Act with § 237(a)(2) of the Act. By contrast, of course, all of the offenses listed in section 212(a)(2) are necessarily "referred to in section 212(a)(2)." We believe that had Congress intended for all of the crimes listed in section 237(a)(2) of the Act to terminate the continuous residency period referred to in section 240A(d)(1) of the Act, it would not have also included the phrase "referred to in section 212(a)(2);" rather, it would have just listed all of the offenses referred to in sections 212(a)(2), 237(a)(2), and 237(a)(4). Otherwise, the phrase "referred to in section 212(a)(2)" is rendered surplusage, because there would be no reason to distinguish between those offenses constituting grounds of removability under section 237(a)(2) but which would not constitute grounds of inadmissibility under section 212(a)(2), and those which fall within both categories. See Matter of Perez, supra at 12-13 (citing Freytag v. Comm'r, 501 U.S. 868, 877 (1991); International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991); Pennsylvania Dep't. of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990)) (provisions within statutes should not be rendered in such a way as to render other provisions superfluous).

Another important rule of statutory construction is that, in ascertaining the "plain meaning" of the statute, the Board must consider both "the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). Indeed, the paramount index of congressional intent is the plain meaning of the words used in the statute as a whole. See INS v. Cardoza-Fonseca, supra at 431. Thus, in construing the language of section 240A(d)(1) of the Act, we will also consider the language in section 240A as a whole. See Matter of Perez, supra, at 7-8 (citing Bailey v. United States, 516 U.S. 137, 146 (1995) (if an ambiguity is perceived when one provision is read in isolation, it is often clarified when it is interpreted in the context of the statutory scheme as a whole)).

First, we will consider the fact that Congress referred to grounds of inadmissibility and removability several times throughout section 240A of the Act. For instance, section 240A(b)(1)(C) refers to sections 212(a)(2), 237(a)(2), and 237(a)(3) of the Act, by stating that only those non-permanent residents who are not inadmissible under section 212(a)(2) or removable under sections 237(a)(2), (3) may be eligible for cancellation of removal. Similarly, in delineating special rules of eligibility for battered spouses or children, section 240A(b)(2)(D) states that these rules only apply to aliens specifically not inadmissible under section 212(a)(2) or (3), or specifically not removable under sections 237(a)(1)(G), (2)-(4) of the Act. The fact that Congress referred to specific--and different--grounds of inadmissibility under section 212(a), and grounds of removability under section 237(a), further gives credence to our belief that, in

section 240A(d)(1) of the Act, Congress intended to differentiate between those grounds of removability under section 237(a) of the Act also referred to in section 212(a)(2) of the Act, and those which are not.

Nonetheless, we are cognizant of the fact that, as the Immigration Judge recognized, this interpretation of section 240A(d)(1) of the Act in fact renders the phrase "or 237(a)(4)" superfluous, because none of the offenses listed in section 237(a)(4) of the Act are referred to in section 212(a)(2) of the Act--these offenses are closely analogous to the offenses referred to in section 212(a)(3) of the Act. Compare § 237(a)(4) of the Act with §§ 212(a)(2), (3) of the Act. Normally, we would not read a statutory provision in such a way as to render another provision superfluous, as we noted above. However, by looking to yet another subsection of section 240A of the Act, we realize that is not our interpretation of the language of section 240A(d)(1) that renders the final clause of that section, "or 237(a)(4)," superfluous.

Section 240A(c) lists all of the categories of aliens who are statutorily ineligible for cancellation of removal. One of the specific categories of aliens ineligible for cancellation of removal are those aliens "deportable [sic] under of [sic] section 237(a)(4)." Section 240A(c)(4) of the Act. Thus, under this provision, no alien who is removable under section 237(a)(4) of the Act is even eligible for the relief of cancellation of removal, and therefore the inclusion of this ground of removability within section 240A(d)(1) is actually an additional reference. Simply put, it would be irrelevant whether a charge of removability under section 237(a)(4) would terminate an alien's period of continuous residence, because that charge would automatically render the alien statutorily ineligible for cancellation of removal pursuant to section 240A(c)(4) of the Act.

Accordingly, we find that because the respondent's conviction, which rendered him subject to removal under section 237(a)(2)(C) of the Act, is not also referred to in section 212(a)(2) of the Act, the respondent is not statutorily ineligible for cancellation of removal. We will therefore sustain the respondent's appeal, and remand this case to the Immigration Judge for a hearing on the merits of the respondent's application for cancellation of removal.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for proceedings consistent with the foregoing decision.

FOR THE BOARD